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NOV 19 1900

No. 101.

Wormley v. Duvall

Filed Nov. 19, 1900.

Supreme Court of the United States.

October Term, 1900.

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JAMES T. WORMLEY, Plaintiff in Error,

vs.

DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 101.

JAMES T. WORMLEY, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The District of Columbia, the defendant in error, laid a curb and sidewalk in front of sublot No. 116, square No. 274, abutting 60 feet on U street, in the city of Washington, D. C., pursuant to authority conferred by the act of Congress approved August 6, 1890, and, as required by the terms of said act, levied an assessment against said lot for the sum of $65.24, being one-half of the cost of the work. Some time thereafter, the owner of said property filed a petition in the Supreme Court of the District of Columbia for a writ of certiorari, and therein prayed that the records of said assessment might be removed to the court for review and that the assessment should be quashed as illegal and void for certain reasons alleged, but principally because the work had been done and the assessment made without notice. Upon the filing of the petition, the Supreme Court of the District of Columbia granted the writ of certiorari *ex parte*, and pursuant thereto the District of Columbia certified

to said court true copies of its record relating to said assessment. The plaintiff in error thereupon moved to quash the tax, notwithstanding the return, and the motion was granted. The tax was quashed, as will appear hereafter, because the owner of the property had not received proper notice of the assessment as required by law.

Thereafter, on the 20th day of July, 1896, the Commissioners of the District of Columbia reassessed against said lot the amount of said tax, pursuant to the provisions of the act of Congress approved April 24, 1896, entitled "An Act To Authorize Reassessments For Improvements and General Taxes in the District of Columbia, and For Other Purposes."

This reassessment was made after due publication in a newspaper in the city of Washington, of a notice of the intention of the Commissioners to reassess the land of the petitioner for one-half of the cost of the improvements that had been made. The petitioner was specifically named in said notice and by the terms thereof was informed that a hearing would be given at the District building on Friday, July 17, 1896, at 12 M. to any and all persons who might desire to object to said reassessment being made. From the return to the writ of certiorari (Rec., pp. 4, 5, 6), it appears that the petitioner made no appearance; and accordingly, as required by law, the Commissioners on July 20, 1896, reassessed the lot of the petitioner for the sum of $65.24, being one-half of the actual cost of the improvement for which the original assessment had been made.

Thereupon, the plaintiff in error filed a second petition for writ of certiorari on the 24th day of September, 1898, praying that the defendant might certify to the Supreme Court of the District of Columbia, true copies of its records pertaining to said reassessment, and that on the coming in of the same, the reassessment might be quashed on the ground that the petitioner did not request the doing of the work, that he was not consulted as to its advisability, that

he had no opportunity to be heard as to the cost or utility of the work and was not notified of the amount of the charge until after the work was completed and the assessment had been made; also because, as claimed, there was no notice by advertisement of the work proposed to be done and for which the assessment was made and because the assessment and reassessment were made without authority of law and in excess of the jurisdiction of the Commissioners.

Pursuant to the writ issued upon said petition, the Commissioners certified to the court a copy of the advertisement (which had been duly published) of their intention to reassess the petitioner's lot, copy of the record of reassessment, the reassessment itself and return of service of notice of such reassessment.

Thereupon, the petitioner moved to quash the reassessment shown by said return, which motion was granted by the justice holding the Supreme Court of the District of Columbia. From the judgment of that court, quashing said reassessment, the District of Columbia prosecuted an appeal to the Court of Appeals of the District, which court on May 2, 1899, reversed the judgment of the Supreme Court of the District of Columbia, sustained the validity of the reassessment and remanded the cause to the court below, with directions to dismiss the petition. From this judgment of the Supreme Court of the District of Columbia, a writ of error has been prosecuted by the petitioner to this court.

ARGUMENT.

The errors assigned in this case involve the validity of the act of Congress approved August 6, 1890 (26 Stats. 296), under which the curb and sidewalk were laid and the assessment against the property of the plaintiff in error was made, and also, the validity of the act of Congress approved April

24, 1896 (29 Stats. 98), authorizing the reassessment of taxes quashed—

> "by reason of an imperfect description, . . . defective return of service of notice or for any technical reason other than the right of the public authorities to levy the taxes or make the improvements in respect of which the assessment was levied."

Section 3 of the act of Congress, approved August 6, 1890 (26 Stat. 296), being "an act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June 30th, 1891, and for other purposes," above referred to, provides as follows:

> "That hereafter the Commissioners of the District of Columbia are authorized in their discretion to order such of the above enumerated work (improvement and repair of alleys, sidewalks and the construction of sewers and sidewalks) as in their opinion is necessary for the public health, safety and comfort, and to pay the total cost of said work from the appropriations therefor; one-half of the cost of such work so done, including material and labor, shall be charged against and become a lien upon the property abutting upon the line of such improvement and shall be levied pro rata according to the linear frontage of each lot, or part of lot abutting such improvement, within 60 days after making such assessment and in order to reimburse appropriations so expended, one-half of the cost of such work so done, including labor and material, shall be charged against and become a lien upon the property abutting upon the line of the said work and shall be levied pro rata upon said property according to its linear frontage upon such terms and regulations as to notice to the proprietors and the methods and terms of such notice as shall seem to the Commissioners of the District of Columbia right and proper, due notice of such terms and regulations being given by publication thereof in some newspaper published in the city of Washington,

> D. C., for such time as said Commissioners shall prescribe."

Pursuant to the authority contained in the foregoing act of Congress, the Commissioners of the District of Columbia laid the curb and sidewalk in front of the property of the plaintiff in error described in his petition, fronting 60 feet on U street, and assessed one-half of the actual cost of the work, amounting to $65.24, against said lot.

The Act of Congress, Approved August 6, 1890, is Constitutional.

As said by the Court of Appeals of the District of Columbia in deciding this case:

> "At any rate the act of Congress, under which this assessment was made, was not and therefore could not be held to be unconstitutional."

While it is true that act of Congress did not in terms expressly provide for notice to the owners of property to be assessed, it is not invalid for that reason.

It will be observed that this act committed the matter generally to the Commissioners, leaving to them the terms and nature of the notice. Pursuant thereto, the Commissioners made a general order on June 24, 1896, providing that in all cases of reassessment of general taxes and assessments for local improvements, notice by publication should be given in one or more newspapers in the city of Washington, twice a week for two weeks. According to the decision of the Court of Appeals of the District of Columbia and of this court, such a course, under such a law, is a legal exercise of the taxing power.

In Paulsen vs. Portland, 149 U. S. 30, the city of Portland passed an ordinance providing for the construction of a sewer and the assessment of the costs thereof upon lots and blocks within a prescribed district. The validity of

this assessment was challenged because of its alleged unconstitutionality, on the grounds that it determined arbitrarily and absolutely, that the property therein described was benefited without giving the owners of property any notice or opportunity to be heard upon that question, and also on the ground that the ordinance itself provided for the construction of the sewer without providing for any notice to the owners of property to be assessed. It was contended that the act of the legislature providing for an assessment must also, to be valid, provide for some kind of notice to the property holder. Mr. Justice Brewer, delivering the opinion of the court, said:

> "But, were it otherwise, while not questioning that notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice. The city is a miniature state, the council is its legislature, the charter its constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council. Thus in the case of Gilmore *vs.* Hentig, 33 Kan. 156, it was held that: 'Where a statute authorizes a city to provide for the construction of sewer and drains, and to tax the cost thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners, held, that such failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same.' See, also, Cleveland *vs.* Tripp, 13 R. I. 50; Davis *vs.*

Lynchburg, 84 Va. 861; Williams *vs.* Detroit, 2 Mich. 560; Gatch *vs.* DesMoines, 63 Iowa, 718; Balt. & Ohio RR. Co. *vs.* Pittsburg W. & K. RR. Co., 17 W. Va. 812, 835."

The Court of Appeals of the District of Columbia, 3 App. D. C. 24, where the same argument was made, said:

> "Many well-argued cases hold that this notice must be provided for in the act which confers the power, and that its omission, therefore, can not be compensated by the fact that the council, board or committee charged with the execution of the law may, of their own motion, provide for notice in the regulations or proceedings, which they may prescribe. Stuart *vs.* Palmer, 74 N. Y. 188; Kurtz *vs.* Sumption, 117 Ind. 1; Ullman *vs.* Mayor of Baltimore, 73 Md. 587."

The court then quotes the decision of the Supreme Court in Paulsen *vs.* Portland, *supra*, and adds:

> "In accordance with the doctrine of the foregoing case [Paulsen *vs.* Portland], it seems that when Congress shall confer the power upon the Commissioners of the District of Columbia to make improvements without the request or consent of the owners of abutting property, and assess a part of the cost against them, *the act itself need not expressly require notice*, provided full discretion is left to the Commissioners in the premises, and in accordance therewith they make public and permanent regulations which shall prescribe a fair, reasonable and uniform mode of giving notice to all parties whose property may be affected."

In Lyman *vs.* Plumer, 75 Iowa, 353, the court said:

> "There is no statute which requires a personal notice, nor is there a statute which requires *any* notice to be given. . . . When the power was conferred on the city to prescribe by an ordinance, the mode, or manner in which the charge for the improvement should be made, it embraced the right

> on the part of the city to do all things necessary to make the assessment a valid charge against the owners of property abutting on the streets. *By necessary implication, the power was conferred on the city to prescribe the notice that should be given. In this respect the city was vested with all the powers vested in the general assembly, and if it was competent for the general assembly to provide that a notice by publication should be given, such power by necessary implication was conferred on the city.*"

While the Court of Appeals has held, and while, perhaps, it is the law, that notice to the owner of property is necessary at some stage of the proceedings before a tax becomes a lien or charge against property, yet the failure to give such notice, if such was the case, would not affect, we assume, the constitutionalty of the act of Congress under which the work was done.

It is contended, however, that this act of Congress imposed upon the abutting property, by the front foot, one-half of the cost of the improvement, without any reference to special benefit, and that it is, therefore, unconstitutional.

As said by this court in Parsons *vs.* District of Columbia, 170 U. S. 45:

> "It is trite to say that general principles announced by courts which are perfectly sound expressions of the law under the facts of a particular case may be wholly inapplicable in another and different case; and there is scarcely any department of the law, in which it is easier to collect one body of decisions and contrast that with another in apparent conflict, than that which deals with the taxing and police powers."

Moreover, in determining the validity of this law, it is important to bear in mind what this court has repeatedly said in relation to the powers of Congress over the District of Columbia.

> "The legislation in question in the present case is

> that of the Congress of the United States and must be considered in the light of the conclusion, so often announced by this court, that the United States possesses complete jurisdiction, both of a political and municipal nature, over the District of Columbia."
>
> Parson *vs.* District of Columbia, 170 U. S. 45.

This court has repeatedly sustained the right of the legislative power to determine the amount of taxes to be raised, the property to be assessed, and upon which it is to be apportioned and the rule of apportionment.

In Spencer *vs.* Merchant, 125 U. S. 345, this court had under consideration an act of the Legislature of New York, directing the assessment of the entire cost of the opening of a street together with a proportional part of the expenses of making the assessment, with interest, to be levied upon certain specified property. The Court of Appeals of the State of New York sustained the act and its decision was affirmed by this court. This court, quoting with approval from the decision of the Court of Appeals of the State of New York, said :

> "The act of 1881 determines *absolutely* and *conclusively* the *amount of tax* to be raised and the *property to be assessed*, and upon which it is to be apportioned. Each of these things was within the power of the legislature whose action can not be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so, and may settle both questions for itself, and when it does so, its action is necessarily conclusive and beyond review."
>
> . . . . . .
>
> "The legislature in the exercise of its power of taxation has the right to direct the *whole* or a *part* of the expense of a public improvement, such as the

> laying out, grading or repair of a street, to be assessed upon the owners of lands benefited thereby and the determination of the *territorial district* which should be taxed, for a local improvement is within the province of legislative discretion."

In Hagar *vs.* Reclamation District, 111 U. S. 702, this court said:

> "Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure."

In Cooley on Taxation, page 447, the following conclusions from many authorities are cited:

> "1. The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.
>
> "2. The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.
>
> "3. *The whole cost in other cases is levied on lands in the immediate vicinity of the work.*"
>
> "*In a constitutional point of view either of these methods is admissible,* and one may be sometimes just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is *legislative*, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible, arbitrary rule."

In Bauman *vs.* Ross, 167 U. S. 584, this court said:

> "The legislature, in the exercise of the right of taxation, *has the authority to direct the whole, or such*

part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or repair of a street, to be assessed upon the owners of lands benefited thereby. Davidson *vs.* New Orleans, 96 U. S. 97; Hagar *vs.* Reclamation District No. 108, 111 U. S. 701; Spencer *vs.* Merchant, 125 U. S. 345; Walston *vs.* Nevin, 128 U. S. 578, 582; Illinois C. RR. Co. *vs.* Decatur, 147 U. S. 190, 198, 199; Paulsen *vs.* Portland, 149 U. S. 30. This authority has been *repeatedly exercised* in the District of Columbia by Congress, with the sanction of this court. Willard *vs.* Presbury, 81 U. S. 676; Mattingly *vs.* Dist. of Col., 97 U. S. 687; Shoemaker *vs.* United States, 147 U. S. 282. . . ."

In Walston *vs.* Nevin, 128 U. S. 578, it was claimed that the act of the General Assembly of Kentucky, so far as it authorized the cost of the improvement of streets and other ways to be assessed against the owners of lots and gave a lien thereon in the manner therein provided, and all the proceedings thereunder, were in conflict with section 1 of the Fourteenth Amendment of the Constitution. The act of the legislature required the cost to be apportioned on the abutting land according to area. Mr. Chief Justice Fuller, in delivering the opinion of the court, quoted the opinion of Mr. Justice Miller in Davidson *vs.* New Orleans, citing Spencer *vs.* Merchant, and confirmed the decision of the court below in favor of the constitutionality of the law.

In Lent *vs.* Tillson, 140 U. S. 316, the question arose as to the validity of an assessment made to meet the cost of widening Dupont street in the city of San Francisco. The law required the value of the land taken and the damages to improvements and all expenses, which should be deemed the cost of widening the street, to be assessed "upon the district hereinafter described as benefited by said widening." The district declared to be benefited was specifically described in the act. This case was elaborately argued by Joseph Choate on behalf of the plaintiff in error, and by

A. H. Garland, solicitor for the defendant. Mr. Justice Harlan, in delivering the opinion of the court, held that the proceedings constituted due process of law and quoted Davidson *vs.* New Orleans and Hagar *vs.* Reclamation District, and said:

> "Tested by these principles the statute providing for the widening of Dupont street can not be held to be repugnant to the constitutional requirements of due process of law."

In the opinion the decision of this court in Spencer *vs.* Merchant was cited with approval. In that case it was specifically argued that the assessment, being on its face in excess of the ascertained benefits, was void under the Constitution.

In Illinois Central Railroad Co. *vs.* City of Decatur, 147 U. S. 190, certain lands of the railroad company were assessed to defray the cost of grading and paving certain streets. While the question involved was whether the company was exempt from local taxation, Mr. Justice Brewer, in delivering the opinion of the court, referred to the decisions of this court and of other courts, with apparent approval, which held in effect that an assessment for improvements made on the basis of frontage of lots upon the street to be improved, is valid.

In Paulsen *vs.* Portland, 149 U. S. 30, it appeared the common council of the city of Portland passed an ordinance for the construction of a sewer, and cast by special assessment the cost thereof upon lots within a prescribed district. The validity of this assessment was challenged by this suit. It was specifically claimed that the law was unconstitutional and void, because the assessment was not imposed according to benefits. Mr. Justice Brewer, in delivering the opinion of the court, said that the law was not in violation of the Fourteenth Amendment.

In Fallbrook Irrig. Dist. *vs.* Bradley, 164 U. S. 112, there was involved the validity of irrigation acts passed by the Legislature of California. It was claimed that the basis of assessment for the cost of construction, as prescribed by the laws, was not in accordance with and in proportion to the benefits conferred by the improvements. This court, in its decision, followed the decision in Spencer *vs.* Merchant and sustained the validity of the act.

In Williams *vs.* Eggleston, 170 U. S. 304, there was drawn in question the validity of a law of the State of Connecticut imposing upon five towns the expense of maintaining a bridge across the Connecticut river at Hartford. In deciding the case Mr. Justice Brewer used this language:

> "Neither can it be doubted that, if the State constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered to be benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees or any other tribunal as to the question whether the property so included within the taxing district is in fact benefited."

This court has sustained the validity of laws, enacted by Congress, authorizing similar assessments for the same kind of work in the District of Columbia.

In Willard *vs.* Presbury, 14 Wall. 676, a bill was filed by Presbury against Willard and the common council of the city of Washington, to compel Willard to pay a special improvement tax and to restrain the city from collecting it from the complainant. The assessment was made for regrading and repaving F street adjacent to Willard's Hotel. The act of Congress under which the assessment

was made directed the cost of the improvement to be assessed against abutting lots. This court said:

> "Some question has been made by the counsel for the appellee as to the power of Congress to confer upon the city authority to assess upon the adjacent proprietors of lots the expense of repairing streets with a new and different paving or repairing an old one. It is asserted that this should be a general tax on the city, but the power, we think, can not well be denied. The Constitution confers upon Congress the authority to exercise exclusive legislation over this District."

In Mattingly *vs.* District of Columbia, 97 U. S. 687, it appeared that the Board of Public Works constructed a sewer along Seventh street, in the City of Washington and caused the sidewalks to be paved. After the completion of the work they made an assessment of *one-third of its cost* upon the property adjoining *according to its frontage*, and it was claimed that the assessment was illegal and void, because, among other things, assessments according to frontage were illegal. The court, by Mr. Justice Strong, said:

> "It may be that the burden laid upon the property of the complainants is onerous. Special assessments for road or street improvements very often are oppressive, but that the legislative power may authorize them and may direct them to be made *in proportion to the frontage*, area or market value of the adjoining property, at its discretion, is under the decisions, no longer an open question."

In Dillon's Municipal Corporations, Vol. 2, Sec. 752 (4th edition), the conclusions reached are thus expressed:

> "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury

> or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency."

It is claimed, however, that Norwood *vs.* Baker, 172 U. S. 269, is a reversal of the former decisions of this court; and that under no circumstances, can the legislative authority determine what proportion of the cost of a public improvement shall be assessed against the property specially benefited thereby, or the rule of apportionment of such benefit. We do not understand that case, however, as holding or deciding anything contrary to the principle now asserted. The only point in judgment in that case was the validity of a law imposing the *entire cost* of laying out a public street by the front foot upon the land abutting such street by a rule of apportionment which disregarded the actual benefits received. It was an extreme case; one in which it was obvious at first blush that the assessment of such an extent and made under such circumstances, amounted to a taking of property, and was not the valid exercise of the power of taxation. We assume, in view of the repeated decisions of this court, that except for that fact and that had this court regarded the assessment in that case as falling under the head of taxation, even though somewhat in excess of the actual benefit to the property assessed, it would not have interfered.

Davidson *vs.* New Orleans, 96 U. S. 97, 106.
Spencer *vs.* Merchant, 125 U. S. 345, 356.
Walston *vs.* Nevin, 128 U. S. 578, 582.
Fallbrook Irrig. Dist. *vs.* Bradley, 164 U. S. 112, 170.

The actual decision in Norwood *vs.* Baker appears to have

been misunderstood by some courts. The subject is commented upon in the recently published second edition of Elliot on Roads and Streets, pp. 578, 579.

Moreover, in that case, this court emphasized the fact that, in order to carry a levy of a tax outside of the domain of taxation and to bring it within the domain of the taking of property, within the meaning of the Fourteenth Amendment, the exaction must be in *substantial excess of the special benefit*, and that only to *the extent of such substantial excess*, would it be a taking of property. In this case, the property of the plaintiff in error abutted upon an unimproved street; and the public improvements, for which the assessment was made, were an obvious, direct benefit to the petitioner's property; and there is no averment in the petition, and it is not asserted, that the petitioner's property was not in fact actually benefited to the extent of the assessment, or that the assessment was in excess, equal to or even approximated the value of the petitioner's property, but the petitioner relies solely upon the naked, legal, technical objection in reference to the rule of apportionment of benefits resulting. These facts, we respectfully submit, clearly distinguish the case at bar from Norwood *vs.* Baker. The same view was taken by the Court of Appeals of the District of Columbia, which court, in this case, did not regard the opinion of this court in Norwood *vs.* Baker as abrogating or reversing its former decision in that regard.

As was said by the Court of Appeals of the District of Columbia (Rec., pp. 13 and 14):

> "This doctrine, in respect to the power of Congress, generally, to determine the propriety of a public improvement, the lands benefited thereby which may be subjected to special assessment to meet the cost, and the rule of ascertainment, is not overthrown by the recent decision in Norwood *vs.* Baker, 172 U. S. 269. That case, as we understand it, denies only the unlimited discretion of the legislature in the premises, and declares that the sub-

stantial benefits, actually received, constitute the boundary.

"As was said by Mr. Justice Harlan, in delivering the opinion of the majority of the court: 'It is *one thing* for the legislature to prescribe it as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and should therefore specially contribute to the cost incurred by the public. It is quite a *different thing* to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum, representing the *whole cost* of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in *substantial excess* of the special benefits accruing to him is, *to the extent of such excess*, a taking under the guise of taxation of private property for public use without compensation.' Idem. p. 279. Parsons *vs.* District of Columbia is not denied, but approved with this qualification of what might else be inferred from the decision: 'If the costs of laying the water mains in question in that case had *exceeded the value of the property* specially assessed, or had been in excess of any benefits received by that property, a different question would have been presented.' Idem., p. 295.

"The authority of the actual decision in the Parsons case remains therefore, unimpaired for this observance. Congress may order a local improvement, designate the property to be assessed on account of special benefits, and prescribe the proportion of the amount, and the rule of ascertainment, without preliminary notice to the owners to appear and be heard in respect of the propriety or character of the improvement, or the designation of the taxing district or area. See, also, Williams *vs.* Eggleston, 170 U. S. 304, 311."

Furthermore, it would seem perfectly apparent from the decision in Norwood *vs.* Baker, that it was not intended to reverse or impair the effect of the previous decisions of this court and particularly its decision in Parsons *vs.* District of Columbia, which came up on appeal from the Court of Appeals of the District of Columbia. On the contrary, this court, in the opinion in Norwood *vs.* Baker, expressly referred to Parsons *vs.* The District of Columbia and distinguished it, and we therefore respectfully submit that this case is controlled by the decision of this court in the Parsons case.

In Parsons *vs.* District of Columbia, 170 U. S. 45, the validity of certain acts of the Legislative Assembly of the District of Columbia and of certain acts of Congress, was assailed, among other reasons, because the act of Congress imposed an assessment without regard to the cost of the work to be done or the value of the improvement and without regard to actual benefits received. In that case, a water main was laid under laws which required an assessment against abutting land, at the rate of $1.25 for each linear foot. It appeared that the total assessment under the law was $2.50 per foot and that the actual cost of the main was $1.50 per foot only. In this case it will be noted the act in question required the assessment according to the front foot of only *one-half* of the cost of doing the work. This court, notwithstanding the fact that the tax levied was in excess of the actual cost of doing the work, sustained the validity thereof.

In Henderson Bridge Co. *vs.* Henderson, 173 U. S. 615, Mr. Justice Harlan, in delivering the opinion of the court, said:

> "But in order to bring taxation imposed by a State or under its authority within the scope of the Fourteenth Amendment of the National Constitution the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt

that such taxation by its necessary operation is really spoliation under the guise of asserting the power to tax. As an act of Congress should not be declared unconstitutional unless its repugnance to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments."

We therefore submit that the act of Congress under consideration is valid.

The Reassessment Act Approved April 24, 1896, is not Unconstitutional, and the Reassessment in this Case was Authorized by That Act and was in Accordance Therewith.

The reassessment act approved April 24, 1896 (29 Stats. 94), provides as follows:

"That the Commissioners of the District of Columbia be, and they are hereby, authorized and directed in all cases where general taxes or assessments for local improvements in the District of Columbia may hereafter be quashed, set aside or declared void by the Supreme Court of said District, by reason of an imperfect or erroneous description of the lot or parcel of ground, against which the same shall have been levied by reason of such tax or assessment not having been authenticated by the proper officer, or of a defective return of service of notice, or for any technical reason other than the right of the public authorities to levy the tax or make the improvement in respect of which the assessment was levied, to reassess the lot or parcel of ground in respect of such general taxes or the improvement mentioned in such defective assessment, with power to collect the same according to existing laws relating to the collection of assessments and taxes: *Provided*, That in cases where

> such taxes or assessment shall be quashed or declared void by said court, for the reasons hereinbefore stated, the reassessment herein provided for shall be made within ninety days after the judgment or decree of said court quashing or setting aside such taxes or assessments and any amount heretofore paid upon an assessment which has been declared void shall be credited the owners upon the reassessment made under the provision of this *bill*" (*sic*).

In this connection, it is proper to observe that on several occasions, the plaintiff in error, in his brief, has referred to the act of Congress approved August 7, 1894 (28 Stats. 247), and particularly on page 9 of his brief, where he states that the notice by publication of the purpose of the authorities to reassess the plaintiff's land was made under the act of Congress approved *August 7, 1894*. As a matter of fact the assessment was made and the sidewalk laid in front of the petitioner's property under the act of Congress approved August 6, 1890, hereinbefore referred to, and the reassessment was made under the act of Congress approved April 24, 1896.

The act of Congress of April 24, 1896, authorizing the reassessment of special improvement and general taxes empowers the Commissioners in all cases where such taxes or assessments are quashed, set aside or declared void by the Supreme Court of the District of Columbia—

> "by reason of an imperfect or erroneous description of the lot or parcel of ground against which the same shall have been levied, by reason of such tax or assessment not having been authenticated by the proper officer, or by a defective return of service of notice, *or for any technical reason other than the right of the public authorities to levy the tax or make the improvement*, in respect of which the assessment was levied, to reassess the lot or parcel of ground in respect of such general tax or the improvement mentioned in the defective assessment, with power to

collect the same according to existing laws relating to the collection of assessments and taxes."

While this statute does not in terms provide for notice to the property owner, in point of fact, sufficient notice of intention to reassess in this case was given by advertisement (Rec., p. 4), and such notice was in pursuance of a general order of the Commissioners, dated June 24, 1896, providing that in all cases of reassessment of general taxes and assessments for local improvements, notice by publication should be given twice a week for two weeks in one or more newspapers in the city of Washington, describing the lot or parcel of land to be reassessed, etc., and fixing a time and place when and where property owners affected might appear and present objections.

It is suggested, however, that the original assessment was quashed by reason of the fact that the Commissioners had no authority or jurisdiction to levy the tax or make the assessment because they proceeded without due process of law and that the assessment was not merely null and void, but that the whole action of the Commissioners was null and void.

The return of the Commissioners set forth in the record, and which, for the purposes of this case, must be taken as true, expressly shows that the assessment was in the first instance quashed "by reason of want of proper notice as required by law," (Rec., p. 5, 6). As said by the Court of Appeals (Rec., p. 15):

> "The reassessment of petitioner, as shown by the record of the proceedings exhibited in the return to the writ, appears to have been regularly made in conformity with the law. The Commissioners provided a rule regulating the giving of notice to the parties interested. That notice was given in this case to the petitioner, to appear and present his objections to the proposed reassessment. The place, day and hour of the hearing were stated in the

> notice. He failed to appear and the Commissioners, after his default, proceeded to assess against his property the amount of one-half of the actual cost of the improvements as ascertained by them. *There is no claim whatever that the amount assessed exceeded the special benefit received from the improvement.* No exception was taken to the return made to the writ in the court below, but objection is now made to its sufficiency because it does not show the particular grounds upon which the first assessment was vacated."

As a matter of fact, as heretofore suggested, the return (Rec., pp. 5, 6) expressly shows that the tax in the first instance was quashed "by reason of want of proper notice as required by law." The court below, proceeding (Rec., pp. 15 and 16) said:

> "At any rate, the act of Congress under which that assessment was made was not, and therefore could not have been held to be unconstitutional. Consequently, the only ground upon which it could have been vacated was the want of the requisite notice or the existence of some other irregularity in the proceeding amounting to a denial of due process of law."

There can be no question that the public authorities had the right to make the improvement, in respect of which the original assessment was levied, and it is equally plain that the intention of Congress was to cure by way of reassessment, original assessments which, for any reason, were defective except only in cases where the Commissioners were without authority to make the improvement itself.

As said by the Court of Appeals in this case (Rec., p. 15):

> "The plain intention of the act seems to be that, where there is a valid law ordering or conferring the right to order an improvement which is within the power of Congress, and imposing or ordering the imposition of a tax therefor, no property owner shall escape the burden by reason of any irregularity in

the original assessment, provided the Commissioners shall, within ninety days from the date of the judgment or decree annulling the same, reassess it in the proper manner."

We therefore submit that the Commissioners were authorized to make this reassessment, by the terms of the act, and that the reassessment was in all respects regular. It follows, therefore, that no doubt can exist as to its validity, if the law itself authorizing the reassessment is constitutional.

No particular reason is pointed out in the brief of the plaintiff in error why Congress can not pass a law requiring the reassessment of a tax, quashed for any technical reason other than the right of the public authorities to levy the tax or make the improvement, in respect of which the assessment was levied. The argument seems to be that the act is unconstitutional because it requires the reassessment of a tax which was levied originally under an unconstitutional law. For the reasons heretofore advanced, however, we submit that the law under which the work was done and the original assessment made, is valid.

The right to pass a reassessment law has been repeatedly exercised in various jurisdictions and the validity thereof repeatedly sustained.

Where at the time of the attempt to levy and assess a tax or assessment, the municipal authorities have jurisdiction of the subject matter, and the acts necessary to be done to acquire jurisdiction and make a valid assessment are prescribed by the statute, and the defect consists in a failure to perform all the acts required, or to perform them or some of them in the mode or within the time required, the legislature has power to legalize the tax or assessment as made, or to authorize a reassessment by providing for the doing of the acts omitted, or by dispensing with the omitted acts, if not necessarily jurisdictional, and making an assessment as originally attempted. Unless controlled by other than

constitutional limitations, the legislature has power within certain exceptions, as where the defect or invalidity is owing to entire failure to acquire jurisdiction in the incipient proceedings, either by direct curative legislation or provision for reassessment, to legalize any tax or assessment which it might have authorized or provided for in the first instance.

Welty on Assessments, 383.
Tefft *vs.* City of Buffalo, 82 N. Y. 204.
Thompson *vs.* Lee County, 3 Wall. 327.
O'Brien *vs.* County Com. of Baltimore, 51 Md. 24.
People *vs.* Mitchell, 55 N. Y. 552.

The original assessment in the case at bar was not invalid because made in violation of any positive law applicable to such proceedings.

There is no pretense in this case that the improvement in respect of which the original assessment was levied was not necessary or proper, or that the mode of proceeding in making the assessment affected the substantial interests of the petitioner.

It has been held that a special tax adjudged to have been levied "without jurisdiction and void" may be reassessed, and the fact that the assessment is made after the improvement has been completed and paid for by the city, and the owners are enjoying the benefit thereof, does not render the assessment unconstitutional.

Howell *vs.* Buffalo, 37 N. Y. 267.

An assessment invalid by reason of a failure to procure the necessary consent in writing of property owners may be reassessed.

In Matter of Van Antwerp, 56 N. Y. 261.

A reassessment may be made where an unconstitutional

assessment for city improvements has been set aside in chancery.

How. Sav. Inst. *vs.* Newark, 52 N. J. L. 1.

Where a special assessment was vacated because contract for paving was illegal and void, the city council not having determined in advance of advertising for bids, the kind and quantity of material, it was held that the tax could be reassessed.

Tuttle *vs.* Polk, 84 Iowa, 12.

The legislature may ratify and cure through reassessment by the local authorities, that which it might have constitutionally and lawfully authorized in the first instance. Whatever in the form and mode of proceedings not going to the ground work and justice of the tax which has failed, the legislature might have dispensed with in the first instance, the same dispensation may be granted afterward. It may dispense with the giving of a notice where that was made necessary, or with the enforcing of work or competition by receiving bids and awarding it to the lowest bidder where that was required, or with other like informalities in the proceedings to make an assessment or levy. These things, though in general very expedient and wise, can not be said to be essential to the exercise of the taxing power.

Dean *vs.* Borchserius, 30 Wis. 247.

As stated by the Court of Appeals, (Rec., p. 15):

> "Where an assessment has been vacated upon such grounds, there can be no doubt of the power of the legislature to provide for a reassessment through a proceeding having due regard to the constitutional rights of the land owner."

The leading case for many years in this court, upon the subject of the assessment of the cost of special improvement,

arose over the reassessment of a special improvement tax which had been set aside for want of proper notice.

Spencer *vs.* Merchant, 125 U. S. 345.

In concluding, we invite the attention of the court to the briefs submitted in the case of Wight et al. *vs.* Davidson et al., No. 283, October Term, 1900, argued early in the present term, wherein is involved the validity of certain acts of Congress requiring the assessment of not less than one-half of the cost of extending certain streets in the city of Washington.

We respectfully submit the judgment of the Court of Appeals of the District of Columbia should be affirmed.

ANDREW B. DUVALL,
CLARENCE A. BRANDENBURG,
Attorneys for Defendant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 102.

ANNA P. HOOVER ALLEN, ANDREW EASTWICK HOOVER, CHARLES P. HOOVER, FANNIE B. BYRNE, ANNIE H. McALLESTER, AND LULU L. THORNTON, HEIRS-AT-LAW OF ANDREW HOOVER, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

STIPULATION NOT TO PRINT RECORD AND TO ABIDE THE DECISION IN CASE OF JAMES T. WORMLEY v. THE DISTRICT OF COLUMBIA, No. 101 OF OCTOBER TERM, 1900.

D. W. BAKER,
Attorney for Plaintiffs in Error.
A. B. DUVALL,
Attorney for Defendant in Error.

(17,469.)

In the Supreme Court of the United States.

JAMES T. WORMLEY, Plaintiff in Error, *v.* THE DISTRICT OF COLUMBIA. } No. 101.

It is hereby agreed and stipulated that the record in this cause contains materially the same issues as the record in the case of Hoover *et al.*, plaintiffs in error, *v.* The District of Columbia, No. 102, with the exception that in case No. 102 the reassessment is one-third of the alleged cost of the improvement, while in No. 101 the reassessment is one-half of the alleged cost of improvement.

It is further agreed and stipulated that the record in No. 101 be printed, and that the printing of the record in No. 102 be dispensed with, and that said No. 102 abide by the decision in No. 101.

A. B. DUVALL,
Att'y for Def't in Error.
D. W. BAKER,
Att'y for Plaintiffs in Error.

[Endorsed:] File No., 17,469. Supreme Court U. S., October term, 1900. Term No., 102. Anna P. Hoover Allen *et al.*, P. E., *vs.* District of Columbia. Stipulation not to print record, and that this case abide decision in No. 101, Wormley *vs.* District of Columbia. Filed Oct. 17, 1900.